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DEC 20
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 188

EDWARD H. TITUS,

Petitioner.

vs.

LOU C. WALLICK.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR PETITIONER.

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Preliminary Statement.

case is in this Court on certiorari to the Supreme f Ohio. Petitioner prayed for the writ on the ground l faith and credit was denied by that Court to a final nt recovered by the petitioner against respondent upreme Court of the State of New York.

lay 1, 1934, petitioner recovered a judgment in the e Court of the State of New York against the re- it in the sum of $389,103.21 (R. 18-21). In August,

1934, petitioner instituted an action in the Common Pleas Court, Franklin County, Ohio (hereinafter referred to as the Common Pleas Court) for the purpose of making the judgment of the Supreme Court of the State of New York a judgment in the State of Ohio (R. 1, 7).

Petitioner's action in the State of New York was instituted on December 22, 1925 (R. 133) and was bitterly contested by respondent. The action was tried twice in the Supreme Court of the State of New York (R. 106; 118) and it was submitted upon five occasions to the Appellate Division of the Supreme Court of the State of New York, First Department (R. 93, 132, 121, 134, 77, 78) and once to the Court of Appeals before final judgment was obtained by petitioner (R. 80, 81). In addition, three references were had (R. 91, 101, 102; 18-20). The Ohio courts have predicated refusal to recognize the New York judgment on the ground of fraud (R. 156, 186, 190).

The Opinions of the Courts Below.

The written opinion dated April 21, 1936, rendered in the Common Pleas Court, is not reported, but it is set forth at length in the record on pages 148-156. The written opinion, dated November 30, 1937, of the Court of Appeals, Franklin County, Ohio (hereinafter referred to as the Court of Appeals) is not reported, but it is set forth at length in the record on pages 178-190. The *per curiam* opinion rendered by the Supreme Court of Ohio is reported in 133 O. S. 612.

The written opinion dated December 2, 1927, of the Appellate Division of the Supreme Court of the State of New York, First Department, after the first trial, in the original action, and by virtue of which it was held that petitioner was entitled to recover from respondent 250 shares of stock of the Secor Hotel Company, is reported in 222 N. Y. App. Div. 17; and the written opinion rendered by said Appellate Division of the Supreme Court of the State of New York

after a second trial, granted upon newly discovered evidence, pursuant to which that court's original determination was adhered to, is reported in 235 N. Y. App. Div. 662. The affirmance thereof by the Court of Appeals of the State of New York was rendered without written opinion and a report thereof appears in 260 N. Y. 519.

No written opinion was rendered by the Appellate Division of the Supreme Court of the State of New York when said court affirmed an order granting a second trial on the ground of newly discovered evidence; nor did said court render written opinions when it vacated the second referee's report and appointed Honorable Jeremiah T. Mahoney as referee and when it affirmed the judgment in favor of petitioner and against respondent in the sum of $389,103.21. Said decisions are reported in 227 N. Y. App. Div. 789; 240 N. Y. App. Div. 818; and 244 N. Y. App. Div. 789, respectively.

Statement of the Case.

The action in the State of New York was instituted by petitioner, by reason of a fraud perpetrated by respondent, to impress a trust on 250 shares of the Secor Hotel Company, an Ohio corporation, representing a one-quarter interest therein (R. 9, 11-13). The action was one in equity and the relief demanded in the complaint contemplated the return of petitioner's 250 shares of stock in the corporation, together with an accounting of the earnings of the Secor Hotel Company since its inception and of the sums received by respondent as dividends or *otherwise*, with respect to the moneys applicable to petitioner's one-quarter interest (R. 13). Petitioner's complaint set forth the fraudulent conduct of respondent in connection with said stock and the resultant injury to petitioner (R. 10-13). In deciding that petitioner was entitled to the return of the stock the Appellate Division of the Supreme Court of the State

of New York stated that petitioner's version as to respondent's fraud was amply supported by the documentary evidence in the case (222 N. Y. App. Div. 17); and when said Appellate Division of the Supreme Court of the State of New York again recognized petitioner's ownership of said stock, after a new trial had been granted on the ground of newly discovered evidence, that court stated that the additional testimony was not of sufficient weight to cause the court to change the determination, in favor of petitioner, reached on the original appeal and for the second time rendered judgment for petitioner (235 N. Y. App. Div. 662). This judgment was affirmed by the Court of Appeals of the State of New York on July 19, 1932 (260 N. Y. 519), and thereafter a reference was had which resulted in the award to petitioner in the sum of $389,103.21 (R. 18-21, 78).

At the time of the institution of the action by petitioner, as plaintiff, in the Common Pleas Court, and at the present time, the judgment in the State of New York in favor of the petitioner and against respondent was and is a final judgment in said State of New York (R. 45, 55, 56). The jurisdiction of the Supreme Court of the State of New York has been conceded by respondent (R. 149, 133, 134, 54) and *no attempt has been made by him to impeach or set aside said judgment on any ground in the State of New York* (R. 46, 49).

The petition filed by petitioner in the Common Pleas Court, on August 20, 1934, alleged the recovery of the aforesaid judgment and attached to said petition was a transcript of the judgment recovered in the State of New York, authenticated as required by the Act of Congress (R. 8, 18-22).

Respondent's amended answer thereto averred three defenses: (1) that the judgment sued upon was not responsive to the issues made by the pleadings; (2) that peti-

tioner was not the real party in interest; and (3) that the judgment in the State of New York was procured by fraud practiced upon the Supreme Court of that State and upon the respondent, in that petitioner was not the real party in interest and suppressed and withheld this fact from the Supreme Court of the State of New York (R. 40, 41). The defenses were predicated, presumably, upon exceptions to the rule that full faith and credit shall be given by each State to the judgments of a sister State. By further amendment respondent's answer set up Section 210 of the Civil Practice Act of the State of New York requiring, with certain exceptions, that every action must be prosecuted in the name of the real party in interest (R. 41, 42).

Petitioner and respondent waived a trial by jury in the Common Pleas Court (R. 44). The evidence in the case was largely documentary and petitioner relied wholly upon the judgment recovered by him in the Supreme Court of the State of New York, duly objecting and taking exception to the introduction of any evidence by respondent in derogation of said judgment (R. 52, 55-58). The trial court found against the respondent on the first defense (R. 149) but in favor of respondent on the second and third defenses, thereupon entering judgment for the respondent on December 3, 1936 (R. 149, 156, 157, 166). The judgment of the Common Pleas Court was affirmed by the Court of Appeals and judgment was entered, with respect thereto, on the 14th day of February, 1938 (R. 190). Petitioner then appealed to the Supreme Court of Ohio (R. 193, 195) under Article IV, Section 2 of the Constitution of Ohio, which gives that court jurisdiction as a matter of right in cases, among other things, involving questions arising under the Constitution of the United States; and petitioner further moved said Supreme Court of Ohio for an order directing the Court of Appeals to certify to the Supreme Court of

Ohio its record for review (R. 198, 199). On April 27, 1938, the Supreme Court of Ohio dismissed petitioner's appeal as of right and granted respondent's motion to dismiss the appeal as of right, so ordering and adjudging on the ground that no debatable constitutional question was involved (R. 195). The Supreme Court of Ohio likewise denied petitioner's motion for an order directing the Court of Appeals to certify to the Supreme Court of Ohio its record for review (R. 195). Five of the seven Judges sitting in the Supreme Court of Ohio rendered the aforementioned decision without opinion, 133 O. S. 612.

A brief summary of the facts leading up to the rendition of the judgment in the Supreme Court of the State of New York and the subsequent judgment in the Common Pleas Court, gives full expression to petitioner's claim that the Ohio courts failed to give full faith and credit to the judgment of the Supreme Court of the State of New York.

Prior to 1924 petitioner had a substantial claim against respondent based upon respondent's fraud in connection with petitioner's 250 shares of stock of the Secor Hotel Company of Toledo, Ohio, which had been withheld from him by respondent for many years (R. 9-13). On or about March 31, 1924, petitioner assigned said claim to his brother, Walter Titus, under an oral understanding with regard to the use of any funds which might be derived therefrom in part to pay off and discharge certain indebtedness of petitioner and in part for the benefit of petitioner's wife (R. 147, 83-85). The assignment was in writing and absolute upon its face.

Approximately three weeks before the commencement of the New York action and on or about December 1, 1925, an instrument (R. 83-85, 85-88; Petitioner's Exhibits D, E) was executed by Walter Titus in order to define more effectively the rights of the various interested parties in said

claim and in order that suit might be brought thereon. This instrument, after referring to the prior assignment and the oral understanding pursuant to which it was made, assigned said claim to petitioner by appropriate words and appointed petitioner as attorney-in-fact to effectuate collection of the claim. It then provided that any money or other property collected upon said claim should be turned over to Walter Titus to be held and used by him, first, toward the payment of the expenses incurred in the collection of the claim, second, to the payment of one-half thereof to the wife of petitioner, third, to the payment or discharge of certain indebtedness of petitioner, and fourth, the balance remaining, if any, to be paid to petitioner. Shortly after said reassignment, suit was instituted by petitioner on this claim in the Supreme Court of the State of New York, and said suit resulted in the judgment hereinbefore referred to (R. 133).

After petitioner recovered judgment in the Supreme Court of the State of New York, one London I. Wallick, the brother of respondent, made claim against petitioner for a share in the proceeds, if any, to be realized from said judgment. (Respondent's Exhibit 7; R. 137-146.) London I. Wallick claimed that an agreement to that effect was made with petitioner on or about November 23, 1925 (R. 141, 93). Petitioner and London I. Wallick were in sharp conflict over whether any such agreement had been made and as to the validity and effect of any writing as evidence of such agreement. Approximately nine years after the institution of suit in the State of New York by petitioner against respondent, said London I. Wallick filed suit against petitioner in the Supreme Court of the State of New York, in which he asked for an injunction *pendente lite*, restraining petitioner from disposing of *any* of the moneys received or collected upon said judgment recovered by petitioner against re-

spondent (R. 137, 138). Petitioner defended said suit and submitted therein an affidavit, dated August 17, 1934, in opposition to the prayer for said injunction. Said affidavit set out at considerable length the history of the transactions between petitioner and respondent and London I. Wallick, relative to the subject matter of the action upon which judgment had been entered for petitioner and, among other things, petitioner's affidavit (R. 141, 145, 146; Respondent's Exhibit 7) set forth the following: "I told him (London I. Wallick) at that time (November 23, 1925) that I had already assigned any interest in the proceeds of said action against Lou C. Wallick to Walter L. Titus and Emilie F. Titus. * * * The plaintiff's application for an injunction *pendente lite* should be denied. Prior to my execution of the instrument of November 23, 1925 (between plaintiff and London I. Wallick), I assigned my interest in my claim against Lou C. Wallick to Walter L. Titus, my brother, and Emilie F. Titus, my wife. The plaintiff herein knew of this assignment before the instrument of November 23, 1925, was executed. It is respectfully submitted that it does not lie within the jurisdiction of this court to now enjoin what has already been accomplished." The words within parenthesis are petitioner's, submitted, presently, for explanatory purposes.

The affidavit was directed specifically to occurrences on and the status as of November 23, 1925 (R. 181, 184, 185). In opposing the motion for the all-inclusive, temporary injunction, petitioner, being entitled to every possible, proper, legal objection, contended, in effect, that London I. Wallick was not entitled to the temporary injunction because he knew of the prior assignment made by petitioner to his brother on March 31, 1924 (R. 95-101, 141), and that said London I. Wallick was not entitled to more than the alleged contract itself contemplated, that is, an interest subject to a known prior assignment. Specifically, whatever occurred

after November 23, 1925, did not concern London I. Wallick, and as far as the latter was concerned, petitioner was entitled to assert such facts as would reveal to the Supreme Court of the State of New York that London I. Wallick, based upon his alleged contract of November 23, 1925, was not entitled to the unusual remedy of an injunction. The substance of petitioner's affidavit was that London I. Wallick could not enjoin what he knew and contemplated could not be enjoined as of November 23, 1925. His proper remedy, if any, was indicated to him in said affidavit interposed by petitioner, to wit, an action to set aside the assignment under the Debtor and Creditor Law of the State of New York (R. 146).

The Court of Common Pleas seized upon the language contained in the affidavit, to assert that petitioner was not the real party in interest in the New York suit, that he had withheld that fact from the New York court and that he was, therefore, not the real party in interest in the suit commenced in Ohio (R. 153-156).

The Court of Appeals characterized the statements, upon which the Court of Common Pleas relied, as mere conclusions with respect to a status prior to the commencement of the New York action (R. 181, 184, 185); but although it adopted reasoning other than that adhered to by the Common Pleas Court (R. 184, 185) it held that petitioner was not the real party in interest in the State of New York under the written reassignment of December 1, 1925, because that instrument constituted petitioner an attorney-in-fact only (R. 182)—a holding contrary to the decisions of the State of New York and to the general principles as enunciated by other courts as to what constitutes a person the real party in interest.

The Court of Appeals, having found by its interpretation of the reassignment of December 1, 1925, that the petitioner was not the real party in interest, then held that he had sup-

pressed and concealed this fact from the New York court, as evidenced by the statements contained in the affidavit (R. 186, 189, 190). While characterizing the statements as mere conclusions (R. 184, 185), referring to a status prior to the commencement of the New York action, that court nevertheless held that the petitioner in making such statements indicated that he knew at the time the action was filed in New York that he was not the real party in interest in the suit. In other words, the Court of Appeals, by virtue of statements made in a collateral proceeding some nine years later, held that the petitioner's state of mind at that time, as indicated by his statements, was such that by necessary inference his state of mind must have been the same nine years before when he filed the suit in New York, and therefore at that time knew that he had no right to file it.

In arriving at its conclusion to affirm the judgment in favor of the respondent granted by the Common Pleas Court, the Court of Appeals virtually disregarded the fact that in 1929 respondent moved in the Supreme Court of the State of New York for a new trial on the ground of newly discovered evidence and that respondent submitted therein an affidavit of one Gentsch, sworn to on March 9, 1929, in which certain matter is set forth with regard to an assignment by petitioner to Walter L. Titus and to petitioner's wife (R. 190, 95-101). *Respondent possessed knowledge in March, 1929, of a prior assignment made by petitioner, and respondent made inquiry with regard thereto on the second trial held in 1930* (R. 119, 120). At that time petitioner testified, on cross-examination, with regard to the assignment. Petitioner testified that he did have an agreement with his brother, Walter Titus, and that it had always been a matter between them. Respondent's counsel proceeded to interrogate petitioner with regard thereto but did not press the point, in his cross-examination, to the extent of ascertaining the exact character of said assignment; *and despite said*

evidence, putting the respondent on inquiry as to a prior assignment of petitioner's claim, respondent made no effort to amend his pleading for the purpose of setting forth a defense with respect thereto.

ARGUMENT.

Summary of the Argument.

POINT I—The controlling authorities in this Court indicate that parties to an action cannot, in a collateral proceeding, impeach a judgment for fraud in the obtaining thereof.

POINT II—Petitioner's judgment remains unimpeached and unimpeachable in the State of New York and, therefore, it was not properly subject to collateral attack in the Ohio courts.

POINT III—Petitioner was the real party in interest in the suit commenced by him in the Supreme Court of the State of New York by virtue of his legal ownership of the claim against the respondent as well as his beneficial interest therein.

POINT IV—The judgment recovered by petitioner in the State of New York is conclusive upon whether petitioner is the real party in interest.

POINT V—Petitioner was not guilty of any fraud on the New York court and even if he was, it did not constitute extrinsic fraud and it did not justify a denial of full faith and credit to the New York judgment.

POINT VI—The findings, conclusions and judgments rendered in the Courts of the State of Ohio are contrary to the evidence and contrary to law.

Point I.

Fraud in Obtaining a Judgment Furnishes no Ground for Collateral Attack.

In *Freeman on Judgments* (5th Ed.), pages 633 and 663, the view is expressed that *parties to an action*, as distinguished from third parties, may not attack a judgment collaterally for fraud, except possibly such fraud which goes to the question of jurisdiction.

See:

Christmas v. *Russell*, 72 U. S. 290, 304-307;
Petroleum Auditors Assoc. v. *Landers*, 182 Okla. 297;
Johnson v. *Petty*, 118 Okla. 178.

This Court has stated, clearly and unequivocally, that fraud in procuring a judgment cannot be set up, by way of collateral attack, to bar recovery thereon. The principle may be expressed by the statement that a judgment may be assailed for want of jurisdiction, but not otherwise.

Christmas v. *Russell*, 72 U. S. 290, 303-306; cited in
Fauntleroy v. *Lum*, 210 U. S. 230, 236, 237;
Hanley v. *Donoghue*, 116 U. S. 1, 4;
Simmons v. *Saul*, 138 U. S. 439, 458;
Thompson v. *Whitman*, 85 U. S. 457;
Maxwell v. *Stewart*, 89 U. S. 77, 81.

The view enunciated in *Christmas* v. *Russell*, *supra*, was reiterated in *Phillips* v. *Griffin*, 236 N. Y. App. Div. 209, at page 211, wherein the court stated that "to raise an issue of fraud, recourse must be had to a suit in equity."

See also:

Scarborough v. *Long*, reported in 197 S. E. 796 (Supreme Court of Georgia, June 14, 1938);
Farrell v. *Kingshighway Bridge Co.*, reported in 117 S. W. (2d) 693 (St. Louis Court of Appeals, Missouri, June 7, 1938);
Reed v. *Futrall*, reported in 115 S. W. (2d) 542 (Supreme Court of Arkansas, April 11, 1938).

In the New York action by petitioner—an equity suit—all that the court required was jurisdiction over the person of the respondent. It acquired that jurisdiction, concededly (R. 149, 133, 134, 54). The failure to recognize the New York judgment in Ohio was based, essentially, on the lack of capacity to sue; but this Court has held that a lack of capacity to sue is not an objection that goes to the jurisdiction of the court.

McCandless v. Furland, 293 U. S. 67, 75.

It follows, therefore, that any claim with respect to lack of capacity to sue on the part of petitioner could not possibly involve fraud as to jurisdictional facts. Fraud as to jurisdictional facts can relate only to such facts as induce the court to assume jurisdiction.

Petroleum Auditors Assoc. v. Landers, 182 Okla. 297.

In *United States v. Throckmorton*, 98 U. S. 61, it was pointed out that extrinsic fraud, as distinguished from intrinsic fraud, may be utilized for the purpose of attacking a judgment, *but the opinion defines extrinsic fraud as relating to a case in which the fraud is of such a character that it prevents an adversary trial* and a disposition of the merits of the cause. It should be noted that the *Throckmorton* case involved an attack upon a judgment by way of a *direct* proceeding, as distinguished from a *collateral* proceeding.

The fundamental distinction between collateral and direct attack, on the basis of fraud, led the Supreme Court of Minnesota in *In re Melgaard's Will*, 200 Minn. 493, to state, in discussing the *Throckmorton* case, that:

> "Only after it has been determined, by other and appropriate standards, to be direct attack, on the ground of fraud, can the distinction between that which is extrinsic and that which is intrinsic find the subject-matter for its operation. In order to be open to collateral attack a judgment must be void on the face of the record, as for want of jurisdiction."

In *Milwaukee County* v. *White Co.*, 296 U. S. 268, this Court stated the following on page 275:

> "A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a speciality. Recovery upon it can be resisted only on the grounds that the court which rendered it was without jurisdiction, *Pennoyer* v. *Neff*, 95 U. S. 714; *D'Arcy* v. *Ketchum*, 11 How. 165; *Tilt* v. *Kelsey*, 207 U. S. 43; or that it has ceased to be obligatory because of payment or other discharge; *Anderson* v. *Clark*, 70 Ga. 362; *Haggerty* v. *Amory*, 7 Allen (Mass.) 458; *First Nat. Bank* v. *Hahn*, 197 Mo. App. 593; 196 S. W. 489; *Revere Copper Co.* v. *Dimock*, 90 N. Y. 33; or that it is a cause of action for which the state of the forum has not provided a court, *Anglo-American Provision Co.* v. *Davis Provision Co.* (No. 1), 191 U. S. 373; compare *Kenney* v. *Supreme Lodge*, 252 U. S. 411, unless it is compelled to do so by the privileges and immunities clause; compare *Douglas* v. *N. Y., N. H. & H. R. Co.*, 279 U. S. 377; *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U. S. 230, and *Broderick* v. *Rosner*, *supra*; or possibly because procured by fraud, compare *Christmas* v. *Russell*, 5 Wall. 290; *Maxwell* v. *Stewart*, 22 Wall. 77; *Hanley* v. *Donoghue*, 116 U. S. 1; *Simmons* v. *Saul*, 138 U. S. 439, with *Webster* v. *Reid*, 11 How. 437; *McNitt* v. *Turner*, 16 Wall. 352; *Cole* v. *Cunningham*, 133 U. S. 107, 112."

It is, however, extremely important to observe that in cases such as *United States* v. *Throckmorton*, 98 U. S. 61; *Cole* v. *Cunningham*, 133 U. S. 107, 112, and *United States* v. *Atkins*, 260 U. S. 220, when this Court discussed the question as to whether extrinsic fraud will bar enforcement of a judgment, a *direct proceeding*, attacking the judgment, was

under consideration; while in *Webster* v. *Reid*, 52 U. S. 437, and *McNitt* v. *Turner*, 83 U. S. 352, suit was brought not to enforce a judgment, but to recover land purchased either under an execution sale or a court decree. In the two latter cases vacation of a judgment was not an objective in the action; the judgment was brought collaterally before the court as evidence and it was held therefore that, similarly, consideration might possibly be given, collaterally, to the subject of extrinsic fraud. The judgment in both the *Webster* case and the *McNitt* case was asserted against one who had no opportunity to contest the matter in the original action and the judgment recovered could not, therefore, serve as an estoppel against the party alleging the fraud. The judgment was offered as ordinary evidence to substantiate a title; and the judgment was subject to ordinary rules of evidence. Neither the *Webster* nor *McNitt* case involved a suit on the judgment itself against the judgment-debtor.

It may be added that *Webster* v. *Reid, supra*, referred to a fraud which ran to the question as to whether jurisdiction was acquired and that *McNitt* v. *Turner, supra*, was a case which upheld the judgment and mentioned, incidentally, that fraud may be asserted collaterally. The opinion in the *McNitt* case does not, however, describe the type of fraud that may be asserted, but the statement follows reference to the matter of jurisdiction and there is clear indication that the fraud which the court had in mind, at that time, was fraud which goes to the question of jurisdiction. In this respect both the *McNitt* and *Webster* cases are completely reconcilable with the doctrine enunciated in *Christmas* v. *Russell, supra.*

Respondent has, in the past, relied upon a number of cases in various State courts to show that fraud may be utilized for the purpose of attacking a judgment. It is significant that an examination of such authorities will reveal

that they may be classified in the following manner: (1) a number of cases involve fraud in obtaining jurisdiction; (2) other opinions uphold a judgment and go on to state, generally, that the judgment is not conclusive if fraud is established, but they do not indicate whether they mean thereby that the fraud shall be utilized in a direct attack or that it may be utilized by way of collateral attack; and (3) some cases relate to instances in which no adversary trial was had.

It is noteworthy that respondent's answer, interposed in the Ohio suit, did not seek to vacate the judgment recovered by petitioner in the State of New York and that the judgment in the Ohio suit did not set aside the New York judgment. The proceedings in Ohio did not involve a direct attack upon the New York judgment.

In the light of the very definite distinction that is drawn between *direct* attack and *collateral* attack the statement in *Milwaukee County* v. *White Co.*, 296 U. S. 268, 276, that recovery on a judgment may be resisted "possibly because procured by fraud", is entirely clear and completely reconcilable with the earlier authorities. It is expressive of the recognized distinction between *direct attack*, which may be countenanced and *collateral attack*, such as the instant case, which will not be countenanced.

Point II.

The Judgment Remains Unimpeached and Unimpeachable in New York and it is Therefore Not Subject to Collateral Attack in Ohio.

The law is well-settled that a judgment of a State court, which had jurisdiction, is entitled in the courts of other States to the same credit, validity and effect which it has in the State in which it was rendered.

Roche v. *McDonald*, 275 U. S. 449, 451, 452.

It follows, therefore, that the New York judgment could be set aside in Ohio for extrinsic fraud only if it could be shown, first, that New York would characterize knowledge of lack of capacity to sue, as one form of extrinsic fraud and, second, that New York would recognize that extrinsic fraud is a proper ground for collateral attack.

Just as respondent would have had the burden in establishing affirmative defenses, such as payment, release, statute of limitations or assignment of the judgment, so he had the burden of proving that the New York judgment was impeachable in that State for extrinsic fraud, if petitioner was not the real party in interest. This burden the respondent failed to meet. No authority whatsoever was furnished on this point by the respondent or by either of the lower courts in Ohio.

Assumptions by a foreign court as to what the New York court should regard as extrinsic fraud are completely unwarranted. An Ohio court cannot assert that a New York court *should* consider itself as having been subjected to extrinsic fraud. To disregard petitioner's judgment it was absolutely necessary for respondent to establish that a New York court *would* consider itself as having been subjected to extrinsic fraud—and only adjudication on this point can be regarded as conclusive. In summary, it is for the New York court—and only the New York court—to state whether its judicial process has been outraged. That statement must be found in the litigated case or in cases of similar nature. Respondent failed completely in his efforts to meet this test.

The New York viewpoint with regard to the effectiveness of a judgment is well stated in *Phillips* v. *Griffin*, 236 N. Y. App. Div. 209, at p. 211:

> "The question involves consideration of the full faith and credit clause of the Federal Constitution. (Art. 4, Sec. 1.) A judgment of a sister state may be assailed for want of jurisdiction over either the person or the

subject-matter but not otherwise. (*Andrews* v. *Andrews*, 188 U. S. 14; *Clarke* v. *Clarke*, 178 id. 186). * * * *If it was intended by defendant to raise an issue of fraud, recourse must be had to a suit in equity.* (*Ferguson* v. *Crawford*, 70 N. Y. 253; *Mayor, etc. of New York* v. *Brady*, 115 id. 599, 617.)" (Italics ours.)

See also:

Boston & Maine R. Co. v. *D. & H. Co.*, 268 N. Y. 382, 391.

The recent case of *Matter of Holden*, 271 N. Y 212 is absolutely conclusive upon the point that petitioner's judgment would not be impeached in New York.

As in the *Holden* case no one may question the validity of the reassignment to petitioner except the assignor and, possibly, petitioner's wife and London I. Wallick, who commenced suit in the State of New York against the petitioner, requesting therein a temporary injunction. As in the *Holden* case the respondent is obligated to make payment to the party who appears to be the legal owner of the claim and no court is empowered to inquire into collateral matters which have no effect whatsoever upon respondent's obligation to account with respect to petitioner's 250 shares of Secor Hotel stock.

The real claim in the *Holden* case was that the party who had obtained the proceeds of a condemnation award by court order knew that he had no right to sue therefor by reason of the fraud which he had perpetrated in obtaining an assignment of the condemnation award; but the New York Court of Appeals did not permit this factor to result in the impeachment of the judgment.

Quite in accord with the principles enunciated by this Court, the New York authorities do not adhere to the view that a judgment may be subjected to collateral attack on the ground of extrinsic fraud. Such New York cases as *Mayor* v. *Brady*, 115 N. Y. 599; *Ward* v. *Southfield*, 102 N. Y. 287;

Corley v. *N. Y. & H. Rail Co.*, 12 N. Y. App. Div. 409; and *Matter of Holden, supra,* which gave consideration to the question as to whether extrinsic fraud would bar enforcement of the judgment, involved a direct attack, by way of motion for new trial or suit in equity, as distinguished from a collateral attack; and it is apparent, therefore, that the New York authorities adhere to the implied distinction set forth in *Milwaukee County* v. *White Co.*, 296 U. S. 268, 276. The case of *Gray* v. *Richmond*, 167 N. Y. 348, is of no significance because the litigants therein proceeded upon the theory that an Indiana judgment could be attacked collaterally and the New York Court of Appeals relied upon the concession. In addition, *Gray* v. *Richmond, supra,* involved fraud in securing jurisdiction.

Reference has been made to the New York authorities under Point III herein to the effect that the courts in the State of New York will disregard all facts with respect to the purpose of an assignment and the disposition of proceeds of suit if the assignment is fair upon its face. Reference has also been made under Points V and IV herein, respectively, to the view adhered to by the New York courts that an adversary trial will bar attack on a judgment and that technical defenses, such as lack of capacity, will be disregarded.

POINT III.

Petitioner was the Real Party in Interest in the New York Suit.

The trial court in Ohio and the Court of Appeals, prerequisite to their ultimate finding that the New York judgment was obtained by fraud, held that petitioner was not the real party in interest in the New York suit and had no right to bring the suit in his own name. The Court of Appeals did not, however, concur in the reasoning by which the trial court reached this result (R. 181, 184, 185).

The trial court disregarded, erroneously so, the reassignment of the claim to petitioner (on December 1, 1925, and held that petitioner was bound by isolated statements contained in his affidavit of August 17, 1934 (R. 153-156). The Court of Appeals took the proper view, that the affidavit referred to petitioner's status as of November 23, 1925, when legal title to the claim was in petitioner's brother and that whether petitioner was the real party in interest depended upon the legal effect of the reassignment of December 1, 1925 (R. 181, 184, 185). The Court of Appeals then proceeded to find as a matter of law—and in doing so it was completely in error—that the reassignment was a mere naked power of attorney (R. 182). It predicated its decision upon (1) the second paragraph of the reassignment which appointed the assignee (petitioner) as attorney-in-fact for the assignor (petitioner's brother) (R. 181, 182) and (2) upon the fact that petitioner had only a contingent right to share in the proceeds of suit after certain payments (R. 183). The opinion concedes, however, that "it is true the payments in these subheadings were to be made to liquidate the indebtedness" of petitioner (R. 183).

It is apparent, and the Court of Appeals so found, that if the instrument of December 1, 1925 (R. 83), *constituted the petitioner the real party in interest in the New York suit then the petitioner should have prevailed in the Ohio action.* This fact would instantly remove any possibility of fraud upon the New York court, as the only fraud alleged is the concealment from the New York court at the time the suit was instituted that the petitioner was not the real party in interest. *The Court of Appeals also conceded that the execution and delivery of the instrument of December 1, 1925 were undisputed* (R. 184).

The reassignment of December 1, 1925, sets forth an unqualified assignment (R. 83-85, 85-88; Petitioner's Exhibits D, E), appoints petitioner as attorney-in-fact for the assig

nor *but for petitioner's benefit* and provides for the distribution of the proceeds as follows: (1) payment of expenses; (2) one-half of the balance to petitioner's wife; (3) payment of petitioner's debts; and (4) payment of the balance to petitioner.

The effect and validity of the reassignment must be determined in accordance with the law of the place where the reassignment was made, that is, in accordance with the law of the State of New York.

Williston on Contracts, Revised Edition, page 1296;
Barbin v. *Moore,* 85 N. H. 362.

In *Carmody's New York Practice,* the standard work on procedure in that State, Vol. 2, pages 804 to 808, appears the following in reference to the "real party in interest" statute when the question of an assignment is involved:

> "The consideration paid, the purpose of the assignment, the use to be made of any proceeds collected, is immaterial. The plaintiff must have some title, legal or equitable, to the thing assigned. But if the assignee have such title, it is enough. So it is of no moment that no consideration was paid for the demand by the assignee, or that others have a claim on the assignee for a portion or for all the proceeds, or that the assignment was made merely for the purpose of bringing an action. The defendant has no legal interest to inquire as to this, for a payment to or recovery by the assignee in such case is a protection to the defendant against any claim that can be made by the assignor. Thus where a judgment recovered by a bank, was, for the bank's convenience, assigned to the cashier by an instrument absolute upon its face, the cashier is the proper party to bring an action upon the judgment as the real party in interest. All that affects the defendant in such case is that the legal title to the judgment is in the plaintiff, so that a payment to, or satisfaction by him would be a full and complete satisfaction as to all others who theretofore had or might thereafter claim an interest in it." (Pp. 806, 807.)

The cases supporting the same principles are:

Sheridan v. *TheMayor*, 68 N. Y. 30;
Schwartz v. *Fletcher*, 238 N. Y. App. Div. 554, 557;
Donlin v. *Carlow*, 120 N. Y. Misc. Rep. 698;
Horne v. *McGinley*, 252 N. Y. App. Div. 296;
Tioga v. *Tidd*, 164 N. Y. Misc. Rep. 273, 286;
Spencer v. *Standard Corp.*, 237 N. Y. 479;
McCauley v. *Georgia R. R. Bank*, 239 N. Y. 514;
Meyers v. *Credit Lyonnais*, 259 N. Y. 399;
Hunter v. *Allen*, 106 N. Y. App. Div. 557;
Allen v. *Brown*, 44 N. Y. 228;
Meeker v. *Claghorn*, 44 N. Y. 349;
Brown v. *Powers*, 53 N. Y. App. Div. 251;
Birdall v. *Read*, 188 N. Y. App. Div. 46;
Hentschel v. *Fidelity, etc.*, 87 F. (2d) 833, 838;
Lentz v. *Oregon*, 116 Oreg. 683;
Seybold v. *Grand Forks*, 5 N. D. 460;
Los Robles Water Co. v. *Stoneman*, 146 Cal. 203;
Elmquist v. *Markoe*, 45 Minn. 305.

This Court has indicated in *Batesville* v. *Kauffman*, 85 U. S. 151, that it is immaterial that the assignor is entitled to part of the proceeds of suit and in doing so it cited the case of *Allen* v. *Brown*, 44 N. Y. 228. It may be interesting to observe that *Batesville* v. *Kauffman, supra*, was relied upon by the United States District Court for the Western District of New York, recently, in holding that on a power of attorney to sue, where there was also an absolute assignment and the assignor retained an interest in the proceeds, the assignee was the real party in interest.

Miele v. *City of Niagara Falls*, 21 Fed. Supp. 442.

The foregoing authorities state not only the New York law but the general law as to who is a "real party in interest"

under modern code provisions. With these authorities in mind it is difficult to follow the reasoning of the Court of Appeals that the reassignment of December 1, 1925, was simply a naked power of attorney and did not constitute the petitioner the real party in interest in the New York suit.

It may be noted, parenthetically, that Section 210 of the Civil Practice Act (New York), pleaded by respondent in his amended answer (R. 41, 42) provides that: "Every action must be prosecuted in the name of the real party in interest, except that * * * a trustee of an express trust * * * may sue without joining with him the person for whose benefit the action is prosecuted." The very least that can be said of the reassignment is that petitioner was, by virtue thereof, the trustee of an express trust. *Hoffman* v. *Foote,* 172 N. Y. 348, 355, expresses the general principle that it is unnecessary to use any particular formula of words in order to create a trust and that principle was given full application in *Banca C. I. Trust Co.* v. *Clarkson,* 274 N. Y. 69, 74. In the latter case the loss suffered by plaintiff was made good by a surety company. It was agreed between plaintiff and the surety company that plaintiff would bring suit in its own name, but for the benefit of the surety company, to recoup the losses, the recovery, however, to be paid to the surety company. Based upon this simple arrangement, *devoid of formality,* the Court of Appeals held that plaintiff was a trustee of an express trust and that it was, therefore, entitled to bring suit in its own name. *Banca C. I. Trust Co.* v. *Clarkson, supra,* is, in and of itself, complete answer to the contention that petitioner was not the real party in interest.

It is well settled, moreover, that an assignor, assigning a claim as security for a debt, still retains sufficient interest in the claim to constitute the assignor the real party in interest. Petitioner had, therefore, a sufficient interest, under the

March 31, 1924 assignment alone, to have brought suit in his own name.

Carmody's New York Practice, Vol. 2, p. 808;
Bachman v. *Hausman*, 241 N. Y. App. Div. 153.

In construing the reassignment, reference may be had to the recitals which show the true intent to make an assignment and not, merely, to appoint an attorney.

The words "sell, assign, transfer and set over" alone effectuate an assignment.

Kalb v. *Leff*, 138 N. Y. Misc. Rep. 830.

In stressing the second paragraph of the reassignment, where petitioner was appointed as the assignor's attorney, the Court of Appeals overlooked the fact that the paragraph is nothing more than a survival of the early law upon the subject of assignments and that it is just a precaution adopted for use in such jurisdictions as still adhere to the common law theory that an assignee must bring suit in the name of his assignor.

Williston on Contracts, Revised Edition, pages 1166-1170, 1294;
People v. *Ladew*, 237 N. Y. 413, at pages 436, 438;
Allen v. *Brown*, 44 N. Y. 228;
Casady v. *Scott*, 40 Idaho 137.

Moreover, the appointment of the attorney provides that petitioner may sell or discharge the claim for his own benefit (R. 84).

The reassignment provides that petitioner, if he collects anything, shall turn the proceeds back to petitioner's brother, but petitioner's brother must use the proceeds in discharging certain indebtedness of the petitioner to petitioner's brother and others, paying one-half thereof to petitioner's wife and the balance to petitioner. These provi-

sions were held wholly inconsistent with an assignment such as would constitute petitioner the real party in interest for the reason that his interest, by virtue thereof, was only contingent (R. 183) and not real, that is to say, he was simply an attorney in fact. This holding is clearly wrong, because what is to be done with the proceeds is no concern of the debtor.

Allen v. *Brown*, 44 N. Y. 228;
Meeker v. *Claghorn*, 44 N. Y. 349;
Wolcott v. *Hillman*, 23 N. Y. Misc. Rep. 459.

In reaching the conclusion that the petitioner was not the real party in interest under the reassignment, the Court of Appeals disregarded entirely the purpose in turning the proceeds of the collection, if any, over to petitioner's brother. The dominant purpose was to pay petitioner's debts to petitioner's brother and others, and to pay petitioner's wife; the balance, if any, to be paid to the petitioner. Petitioner's brother had no interest in the claim other than as security for the payment of the petitioner's debt to him—the balance belonged to the petitioner and his wife. As part of petitioner's brother's security, he was to handle the funds if the petitioner collected any, a provision clearly incidental to the primary purpose of the instrument.

Had petitioner no interest other than payment of his obligations to this brother, they were, after all, his own obligations, which fact alone would give him a real, substantial, beneficial interest. On this point *Brown* v. *Ginn*, 66 O. S. 316, referred to by the Court of Appeals (R. 183), is inapplicable; and, moreover, that case involved a champertous transaction.

Stricks v. *Siegel*, 135 N. Y. Misc. Rep. 608, affirmed as modified 138 N. Y. Misc. Rep. 266.

The Court of Appeals hopelessly confused the question of title to the claim with the question of the disposition of

the proceeds. The distinction was clearly pointed out in *Warshauer* v. *Webb*, 9 N. Y. St. Rep. 529, in that the right of one entitled to a part or all of the proceeds can only attach after the claim has been collected and not before. The very fact that the reassignment requires the petitioner to "endorse, transfer and deliver" (R. 84) the proceeds to petitioner's brother connotes title thereto in the petitioner. As between the assignee and the debtor, the only concern of the debtor is whether payment to the assignee is a complete satisfaction and extinguishment of the claim.

The Court of Appeals relied upon *Spencer* v. *Standard Chemicals Co.*, 237 N. Y. 479, 143 N. E. 651, as supporting its conclusion *and quoted from the headnote* found in the Northeastern Reporter (R. 183), which is inaccurate because, while the opinion itself says that a plaintiff must have "some title, legal or equitable, to the thing assigned", the headnote omits the significant word "some".

In *Cummings* v. *Morris*, 25 N. Y., 625, 627, also relied upon by the Court of Appeals (R. 184), there is nothing therein contained contrary to the well-recognized principle of law already expressed that the purpose of an assignment or the use to be made of the proceeds is immaterial. It states, simply, that an assignee is a real party in interest if, as between assignor and assignee, the transfer is complete, so that the assignor is divested of all control and right to *the cause of action*, and the assignee is entitled to control it (the cause of action) and *receive* its "fruits". Under the New York cases, petitioner had the power to receive the "fruits" of the cause of action. Walter Titus was divested of all control over the cause of action, *as such*, and under the authorities, the power to "receive" need not be coupled with any beneficial interest. Petitioner's beneficial interest cannot be disputed; but it is submitted that even if he had no beneficial interest, he would still be a

real party in interest by virtue of the view expressed in *Cummings* v. *Morris, supra.*

In summary, until the respondent is discharged—and he cannot have any concern in what occurs thereafter—petitioner has legal title under paragraph 1 of the reassignment. By reason of the common law he is given protective powers under paragraph 2—powers not in derogation of the legal title and quite consistent with the assignment itself. And under paragraph 3 he has legal title to both the claim and the proceeds at all relevant times (in so far as respondent is concerned).

Point IV.

The New York Judgment is Conclusive Upon Whether Petitioner is Real Party in Interest.

Whether petitioner was the real party in interest is now immaterial, as the judgment of the New York court is conclusive upon that issue and the question could not be raised in the Ohio action. Lack of capacity to sue is not an objection that goes to the jurisdiction of the court.

McCandless v. *Furland*, 293 U. S. 67, 75.

By paragraph II of his second amended complaint in the New York action (R. 9), petitioner asserted he was the plaintiff in the action and "now is and since in or about the month of October, 1908, has been the owner of a one-quarter interest" in the Secor Hotel Company, represented by 250 shares of the common stock of that company. The ownership of the stock and the alleged interest of petitioner in the company were the basis of petitioner's claim. The complaint then proceeds to set forth the fraudulent conduct of respondent in connection with the stock and the resultant injury to petitioner. By his second amended answer (R. 40) respondent specifically denied the allegations of Paragraph

II of said amended complaint, thus putting squarely in issue the petitioner's ownership of the stock and the claim sued upon. The New York judgment is conclusive, not only as to matters thereby actually determined, but also as to every other matter which might have been litigated and decided upon the issues made in the case, and upon which it was tried. *This doctrine is peculiarly applicable to defenses not going to the merits of the controversy, such as real party in interest, capacity to sue, etc., and a judgment cannot be impeached collaterally by the assertion of such defenses after judgment.*

23 Cyc. 964;
34 C. J. Sec. 859;
Freeman on Judgments, 5th Ed., pages 753-756;
Roby v. *Rainsberger*, 27 O. S., 674;
Smead v. *Fay*, 1 Disney (Ohio) 531;
Abraham French v. *Marx*, 8 N. Y. Misc. Rep. 490;
Phillips v. *Griffin*, 236 N. Y. App. Div. 209;
U. S. v. *California & Oregon Land Co.*, 192 U. S. 355.

It matters not that the plaintiff may have falsely represented or withheld from the defendant his lack of capacity to sue or the fact that he was not the real party in interest.

Toole v. *Fite*, 57 Utah 1.

Whether the respondent knew of the defenses which he failed to assert in the original action is immaterial.

Cauldwell v. *City of New York*, 252 N. Y. App. Div. 559, 562; affirmed 278 N. Y. 7 (Mem.).

Still another principle prevents the respondent from setting up, in the Ohio suit, the defense of the real party in interest, and that is the doctrine that a party cannot set up, after judgment, facts constituting a defense of which he

was ignorant, but which, had he been diligent, he could have discovered.

Toledo Co. v. *Computing Co.*, 261 U. S. 399, 421;
Mayor, etc. v. *Brady*, 115 N. Y. 599;
Harrington v. *Denny*, 3 Fed. Supp. 584, 593; appeal dismissed, 68 F. (2d) 1004;
Moffett v. *Robbins*, 81 F. (2d) 431.

Surprising as it may seem, there is no discussion by the Court of Appeals of this elementary principle of *res judicata* and its application to the instant case (R. 190).

Point V.

The Absence of Extrinsic Fraud.

The Court of Appeals, having determined that the petitioner was not the real party in interest under the reassignment of December 1, 1925, then proceeded to determine whether he suppressed and concealed that fact from the New York court, and if he did, whether he committed such a fraud on the New York court as would deny to the New York judgment full faith and credit in Ohio. The court found the solution of the question "difficult" (R. 186).

In reaching its conclusion that petitioner has concealed and suppressed from the New York court the fact that he was not the real party in interest, the court had recourse to the affidavit filed by the petitioner in the London Wallick action some nine years after the beginning of the original action. The circumstances surrounding the affidavit are fully set forth in the statement of the case (*ante*, pp. 7-9).

Although the Court of Appeals had previously in its opinion characterized parts of the affidavit as simply conclusions and of no effect whatever in determining petitioner's actual status before the New York Court in the original action (R. 181, 184, 185), nevertheless, it held that these "conclusions",

made nine years later, were evidence establishing that when the petitioner filed his original action he knew that he was not the real party in interest under the reassignment of December 1, 1925. This line of reasoning cannot be followed.

The fact remains, and it is undisputed, that when petitioner originally filed his suit in New York he had the reassignment of December 1, 1925, duly executed and delivered in his possession (R. 68, 88, 184). Even if that instrument did not constitute the petitioner the real party in interest as a matter of law, it was such an instrument as would justify any layman in thinking that it did give him authority to institute the suit; and, therefore, failure to disclose any supposed information in the instrument would clearly not be fraudulent. To hold that because of statements made by petitioner nine years later, in a collateral proceeding, he therefore had interpreted an instrument to his disadvantage nine years before and concealed this interpretation from the court, is extending the probative value of such evidence beyond sound legal principles. The statements contained in the affidavit, when considered and interpreted in the light of the entire affidavit and in the light of the circumstances under which it was given, do not warrant any such extension of its probative value (*ante*, pp. 7-9).

There is a legal principle of universal recognition and acceptance that the fraud which may possibly render a judgment vulnerable to impeachment is "extrinsic" fraud as distinguished from "intrinsic" fraud, or, in other words, fraud collateral to the matter tried as distinguished from fraud connected with the merits of the controversy. In discussing what constitutes "extrinsic" fraud, this Court, in the leading case of *U. S.* v. *Throckmorton*, 98 U. S. 61, said at pages 65 and 66:

> "But there is an admitted exception to this general rule in cases where, by reason of something done by the

successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. See Wells, Res Adjudicata, Section 499; *Pearce* v. *Olney*, 20 Conn. 544; *Wierich* v. *DeZoya*, 7 Ill. 385; *Kent* v. *Ricards*, 3 Md. Ch. 392; *Smith* v. *Lowry*, 1 Johns. (N. Y.) Ch. 320; *DeLouis et al.* v. *Meek, et al.*, 2 Iowa 55."

See also:

Wright v. *Saltmarsh*, 174 Oklahoma 226;
Jacobowitz v. *Herson*, 268 N. Y. 130, 133, 134.

The distinguishing character of "extrinsic" fraud is that it is that kind of fraud which prevents an adversary trial upon the issues. If a party has lost his case by false swearing, perjury, concealment, etc., all of which go to the merits of the controversy and the issue before the court and none of which prevents him from having an adversary trial on the merits, then he has his remedy by way of new trial, appeal, error, vacation, etc., but once the judgment has become final, it is conclusive upon him and cannot be collaterally attacked. The principle, although it may operate harshly in some instances, is a rule of necessity—the public necessity that there be some time an end to litigation. As has been

shown, heretofore, non-disclosure of lack of capacity to sue or that the petitioner is not a real party in interest does not constitute fraud under any definition, for the obvious reason that a party is not required to disclose to his adversary facts which would defeat his recovery. If such non-disclosure be accompanied by concealment or false swearing or perjury, it can rise only to the dignity of "intrinsic" fraud and furnishes no basis for a collateral attack upon the judgment.

Toole v. *Fite*, 57 Utah 1;
Borgos v. *Price*, 140 N. Y. Misc. Rep. 287;
Harrington v. *Denny*, 3 Fed. Supp. 584, 593, 594 (appeal dismissed 68 F. (2d) 1004);
Matter of Holden, 271 N. Y. 212.

It should be noted, moreover, that the term "extrinsic fraud" means *actual* fraud. It signifies a case where one knowingly and deliberately seeks to take undue advantage of another for the purpose of defrauding him; and this is true as well, in a case where the fraud consists of a concealment.

Freeman on Judgments, 5th Ed. page 2569;
Dockery v. *Central*, 45 Arizona, 434;
Ward v. *Southfield*, 102 N. Y. 287.

In this case there is absolutely no connection whatsoever between petitioner's arrangement to distribute the proceeds of suit and the respondent's obligation to return petitioner's 250 shares of stock and his obligation to account with respect to the moneys received by him during his possession thereof. What undue advantage was taken when petitioner obligated himself to make distribution of the proceeds of his claim to his wife and to creditors, retaining the right to any balance remaining thereafter? What fraud was perpetrated by this arrangement upon respondent—one who has no interest whatsoever in what petitioner seeks to accomplish with the

proceeds of his claim? If petitioner had assigned his claim to petitioner's brother and if petitioner's brother had reassigned it by simple instrument prior to petitioner's suit against respondent, then, certainly, it could not be contended that petitioner was under duty to reveal what had occurred to the New York court. This hypothetical illustration is, in effect, the instant case. The only difference is that the reassignment under review provides for certain beneficial interests—*a matter that does not concern the respondent.* The hypothetical illustration and the instant case are the same in that in both there is the complete assignment of legal title.

Petitioner proceeded under an instrument of reassignment which indicated to him that he had a perfect right to sue in his own name and it is inconceivable that any court would contend, that petitioner, a layman, armed with that instrument, intended to perpetrate a fraud upon the New York court.

Point VI.

The Findings, Conclusions and Judgments Rendered in the Courts of the State of Ohio are Contrary to the Evidence and Contrary to Law.

When the Court of Common Pleas and the Court of Appeals found and concluded that petitioner was not the real party in interest and that he perpetrated a fraud upon the New York court, the Ohio courts went, of necessity, behind the New York judgment, and in doing so they made findings completely interwoven with their denial of full faith and credit to the judgment recovered by petitioner in the courts of the State of New York. If, in a suit on a foreign judgment, a court inquires into defenses such as payment after judgment, general release or lack of capacity to sue by reason of assignment of the judgment, and the trial court

makes findings adverse to the judgment creditor, such findings are not in derogation of the constitutional safeguard. But if the trial court inquires into defenses existing prior to the rendition of the judgment, its findings, adverse to the judgment-creditor, are, of necessity, completely interwoven with its denial of full faith and credit. To find that petitioner was not the real party in interest under the Ohio law, the Ohio courts determined first that petitioner was not the real party in interest in the New York suit and that he perpetrated a fraud upon the New York courts. In making such determination, the Ohio courts went, automatically, behind the New York judgment conclusive, as to all matters which were actually determined and all matters which might have been litigated—including the defense of lack of capacity to sue.

This Court may properly review the findings upon which the Ohio courts determined that petitioner was not the real party in interest and that he perpetrated a fraud upon the New York courts because, as heretofore stated, the findings are completely interwoven with the denial of full faith and credit to petitioner's judgment recovered in the State of New York.

Fiske v. *Kansas*, 274 U. S. 380, 385;
Kansas City So. Rwy. v. *Albers Comm. Co.*, 223 U. S. 573, 591.

The Court of Common Pleas, disregarding the binding reassignment, predicated its findings upon statements contained in petitioner's affidavit of August 17, 1934, but when those statements are properly considered and interpreted, they do not warrant the interpretation that petitioner perpetrated a fraud upon the Supreme Court of the State of New York. As was found by the Court of Appeals, the affidavit was directed specifically to occurrences on and a status as of November 23, 1925. London I. Wallick was not seek-

ing to enjoin petitioner's interest in the judgment obtained against respondent. He was seeking, rather, to enjoin the disposition of *all* of the proceeds of the judgment (R. 137, 138). In opposing the motion for the completely comprehensive, temporary injunction, petitioner was entitled to every possible and proper legal objection. With certainty, London I. Wallick was not entitled to the temporary injunction because he knew of the prior assignment made by petitioner to his brother on March 31, 1924 (R. 95-101, 141). London I. Wallick was not entitled to more than the alleged contract itself contemplated, that is, an interest subject to a known prior assignment. Specifically, whatever occurred after November 23, 1925, did not concern London I. Wallick and as far as he was concerned, petitioner was entitled to assert such facts as would reveal to the Supreme Court of the State of New York that London I. Wallick, based upon his alleged contract of November 23, 1925, was not entitled to the unusual remedy of an injunction. It is also noteworthy that when petitioner commenced his action in New York he was the possessor of the reassignment of December 1, 1925, which had been duly executed and delivered to him. *In addition, both the Court of Appeals and the Court of Common Pleas disregarded the fact that respondent possessed knowledge in March 1929 of the prior assignment made by petitioner (both from Gentsch's affidavit and from petitioner's cross-examination at the second trial) and that respondent made no effort to amend his pleading for the purpose of setting forth any defense with respect thereto.* (R. 119, 120, 95-101, 190).

Proper interpretation of the affidavit of August 17, 1934, that is to say, *as the Court of Appeals said*, that it applied to a status as of November 23, 1925, when coupled with respondent's knowledge of facts sufficient to enable him to plead, in the Supreme Court of the State of New York, a

defense of lack of capacity to sue and when coupled with the further fact that when petitioner commenced his New York action he was in possession of a duly executed and delivered instrument of reassignment, destroys completely any finding or inference of fraud perpetrated upon the New York courts. The circumstances referred to—(1) proper interpretation of the affidavit, (2) respondent's knowledge of the assignment and (3) petitioner's possession of a duly executed and delivered instrument of reassignment—when linked together with the abundance of authority on the point that the instrument of reassignment was quite sufficient to transfer both legal and beneficial ownership to petitioner, lead to the single inference that the Ohio adjudication—that petitioner was not the real party in interest and that he perpetrated a fraud—is contrary to the evidence and contrary to law.

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court of the State of Ohio and the judgments of the Court of Appeals of Franklin County, Ohio and of the Court of Common Pleas of Franklin County, Ohio, should be reversed.

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